

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK SCOT DONLEY,

Defendant-Appellant.

UNPUBLISHED

February 23, 1999

No. 201587

Ingham Circuit Court

LC No. 96-070582 FC

Before: White, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, conspiracy to commit kidnapping, MCL 750.157a; MSA 28.354(1), and kidnapping, MCL 750.349; MSA 28.581. He was sentenced to three concurrent sentences in prison: life without parole for the first-degree felony murder conviction, thirty-five to sixty years for the conspiracy conviction, and fifteen to sixty years for the kidnapping conviction. He appeals as of right. We affirm.

I

Defendant first raises two alleged errors in the instructions the lower court gave the jury. Defendant did not preserve either of the alleged errors for appellate review; however, this Court may review the jury instructions where relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052, *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1994); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). No manifest injustice resulted from the errors alleged by defendant. First, there is no merit in defendant's argument that the lower court improperly instructed the jury regarding the kidnapping charge against him. Separate and specific instructions on a predicate felony are required when there is evidence to support them. *People v Sanders*, 190 Mich App 389, 392-394; 476 NW2d 157 (1991); *People v Mosley (On Remand)*, 72 Mich App 289, 294; 249 NW2d 393 (1976), *aff'd* 400 Mich 181; 254 NW2d 29 (1977). Second, there is no merit in defendant's argument that the lower court should have instructed the jury to first consider whether defendant committed murder, then determined whether defendant committed kidnapping, thereby elevating the charge of second-degree murder to first degree. A trial court must

instruct the jury to consider the principal offense before considering the lesser. *People v Fisher*, 166 Mich App 699, 712-713; 420 NW2d 858 (1988). Furthermore, the jury was adequately instructed on the independent element of malice necessary to establish murder.

Although the lower court committed no error in instructing the jury in this case, defendant's arguments reveal that his right against double jeopardy under the state constitution was violated by his convictions for both felony murder and the underlying felony, kidnapping. See *People v Wilder*, 411 Mich 328, 352; 308 NW2d 112 (1981); *People v Passeno*, 195 Mich App 91, 96-97; 489 NW2d 152 (1992), overruled on other gds by *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998); *People v Lumsden*, 168 Mich App 286, 300-301; 423 NW2d 645 (1988). The prosecution properly concedes this point on appeal. Because defendant was erroneously convicted of both felony murder and the underlying felony, the conviction and sentence for kidnapping must be vacated.

II

Defendant below challenged the admissibility of his inculpatory statements, and the trial court heard testimony regarding the circumstances of defendant's statements outside the presence of the jury.¹ The trial court found that defendant voluntarily made his statements to the officers and therefore admitted the taped confession at trial. On appeal, defendant asserts that the court erred in reaching this conclusion.² When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id.*

The court should consider the totality of the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *Sexton, supra*, citing *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Our independent review of the totality of the circumstances surrounding defendant's confession indicates that it was freely made. Thus, the court's finding that defendant's confession was voluntary was not clearly erroneous.

III

Next, defendant argues that the lower court abused its discretion in admitting three pieces of evidence at trial: defendant's confession where the officers' interview was not recorded,³ the photographs of the victim's body, and the alleged hearsay testimony of an investigating police officer. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant argues that his confession should have been suppressed where the police failed to make an audio or video recording of their entire interview. For support, defendant relies upon a

nonbinding decision by an out-of-state court, *Stephan v State*, 711 P2d 1156 (Alaska, 1985). This precise case and issue was considered by this Court in *People v Fike*, 228 Mich App 178; 577 NW2d 903 (1998). There, this Court declined “to ‘fiat’ our views of police practice into a constitutional mandate when the Michigan Legislature has not yet spoken on the subject.” *Id.* at 183. Moreover, this Court observed that even the Alaska court suggested that there is no reason to exclude a defendant’s statements if no testimony is presented that the statement is inaccurate or was obtained improperly. Here, as previously observed, there is no evidence that defendant’s statement was improperly obtained. Likewise, the circumstantial evidence in this case corroborated defendant’s statement. Last, the *Fike* panel pointed out that the majority of state courts that have considered this issue have specifically rejected the conclusion reached by the Alaska court. *Id.* at 185. In short, defendant does not present a basis upon which to find that the lower court erred in admitting defendant’s confession without a recording of the interview.

Defendant next argues that the lower court improperly permitted admission of photographs of the victim’s decapitated body and head. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence more probable or less probable than it would be without the evidence. MRE 401, *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). Here, the prosecution properly asserts that this evidence of the beheading made two material points more probable: the intent to kill and the existence of a conspiracy. First, the photographs helped to show defendant’s intent, a disputed element of the offense at issue, by revealing that “taking care of” the victim – murdering him and disposing of his body – was not a thoughtless process. Second, the photographs depicting the beheaded corpse corroborated defendant’s statements about the role of the victim’s wife in the conspiracy. For these reasons, the photographs constituted relevant evidence. Furthermore, even assuming error in the admission of the photographs, we are satisfied that the photographs did not affect the outcome of the trial. *People v Mateo*, 453 Mich 203,215; 551 NW2d 891 (1996).

In arguing that the evidence is irrelevant, defendant relies upon *People v Falkner*, 389 Mich 682, 684-685; 209 NW2d 193 (1973), where our Supreme Court decided that the photographs of the victim in that case were irrelevant because the defendant claimed an alibi defense. That case is distinguishable from this case because defendant here did not deny his participation in this case, and it was precisely his intent that was at issue below and on appeal.

Despite defendant’s arguments that the photographs were prejudicial because they unnaturally enhanced the gruesome nature of the scene, the investigator from the police crime laboratory confirmed that the photographs accurately depicted the victim at the scene. If a photograph is admissible for a proper purpose, it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime. *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997). Moreover, it is proper for this Court to defer to the lower court’s contemporaneous assessment of the presentation, credibility and effect of the testimony in deciding the prejudicial effect of the evidence. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). Accordingly, we find no abuse of discretion in the court’s decision to admit the photographs.

Last, defendant argues that the lower court abused its discretion in admitting the alleged hearsay statement of an investigating officer during the prosecution's direct examination. The prosecutor asked the officer investigating the breaking and entering of the victim's home whether the victim had identified any individuals whom he suspected of committing the crime. The officer answered in the affirmative, and the prosecutor next asked whether he had recorded those names in his report. On hearsay grounds, defendant objected before the investigating officer could answer. The prosecutor argued that the statement should be admitted pursuant to MRE 803(3), and the court agreed. Accordingly, the officer answered that the names in reported by the victim were defendant and the victim's wife.

MRE 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is not excluded by the hearsay rule. Defendant argues that the answer was improperly admitted pursuant to this rule of evidence because the declarant's state of mind was not at issue. On appeal, the prosecution concedes that this rule of evidence did not permit admission of the officer's answer. Nevertheless, the prosecution argues that the lower court's admission of the officer's answer was proper because the statement was not hearsay where it was not admitted for the truth of the matter asserted, i.e., the identity of the person who committed the breaking and entering. See MRE 801(c). Indeed, the proofs admitted at trial did not support the victim's suspicion that the perpetrator was either his wife or defendant but rather supported the belief that another person had broken into and entered his home. In reviewing the course of the officer's testimony about his investigation, the victim's suspicion served to explain why the investigating officer later contacted the victim's wife. Because the statement was not hearsay, it was properly admitted, and the trial court's misidentification of the ground for the admission of evidence does not require reversal. See, e.g., *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992).

III

Defendant claims that the prosecution did not proffer sufficient evidence to support the jury's finding that he harbored the "malice" necessary for finding him guilty of felony murder beyond a reasonable doubt. See *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980); *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). Specifically, defendant argues that the evidence showed only that defendant may have suspected that the principal was going to kill the victim, not that it was defendant's intent to do so .

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515, 441 Mich 1201; 489 NW2d 748 (1992). However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514.

Defendant's argument is without merit. If an aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with "wanton and willful disregard" sufficient to support a finding of malice. *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985). Here, defendant conceded to the interviewing officers several times that he

knew the plan was to kill the victim. The jury heard both the tape of defendant's confession and the officer's testimony about these statements made by defendant in the interview. Therefore, this Court should conclude that a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

IV

Last, defendant argues that the lower court abused its discretion in denying his motion for a mistrial after the victim's next door neighbor testified about defendant's alleged threats to the victim. Defendant complained that he did not know the full account of the neighbor's testimony and did not have time to establish his client's alibi for the time period about which the neighbor testified. This Court reviews a lower court's decision concerning a party's motion for mistrial for an abuse of discretion. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990); *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). An abuse of discretion will be found only where denial of the motion deprived the defendant of a fair and impartial trial. *Manning, supra*.

The prosecutor, who apparently was assigned to this case late, explained that he and others assisting him conducted interviews after trial had begun in order to review the witness' prior statements. During the interview of the neighbor, the neighbor volunteered this information about defendant's threats to the victim. The witness herself stated that she had forgotten about the incident. The lower court found that the prosecutor's failure to disclose the information obtained at the witness' interview did not violate MCR 6.201, the court rule governing a prosecutor's responsibility to disclose known information. The court found that the witness' statements were neither tape recorded nor a part of the police report prepared in this case. Therefore, the court denied defendant's motion for a mistrial. The lower court's decision did not deprive defendant of a fair and impartial trial. Indeed, a pretrial interview of this witness by defense counsel would have likely alleviated any surprise counsel felt upon hearing the witness testify at trial. See, e.g., *People v Finley*, 161 Mich App 1, 9-11; 410 NW2d 282 (1987).

In conclusion, no issue presented by defendant reveals any error requiring reversal.⁴ We vacate defendant's conviction and sentence for kidnapping and affirm defendant's remaining convictions and sentences for first-degree felony murder and conspiracy.

/s/ Helene N. White

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

¹ See *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

² In his brief on appeal, defendant also refers to whether he knowingly and intelligently waived his *Miranda* rights; however, defendant did not identify this issue in his statement of questions, as required by MCR 7.212(C)(4). Accordingly, we decline to address the issue. See, e.g., *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

³ Defendant failed to preserve the recording issue; however, this Court may take notice of plain errors that affected substantial rights even if not raised before the trial court. See MRE 103, *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994).

⁴ Accordingly, there could be no cumulative effect of errors requiring reversal, which was the last issue presented by defendant.